

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

**UNITED PARCEL SERVICE, INC.**

**and**

**Case 06-CA-143062**

**ROBERT C. ATKINSON, JR., an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN REPLY TO  
RESPONDENT'S ANSWER TO GENERAL  
COUNSEL'S LIMITED EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

In accordance with Rule 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel respectfully requests that the Board consider the following brief in response to Respondent's Answer to General Counsel's Limited Exceptions to the Administrative Law Judge's Decision dated February 24, 2017 ("Respondent's Answering Brief"). In support of this Reply, Counsel for the General Counsel states the following.

Many of the matters raised in Respondent's Answering Brief have already been addressed in Counsel for the General Counsel's Limited Exceptions and its brief in support thereof, and will not be repeated here. Certain issues, however, merit a response.

In its Answering Brief, Respondent suggests that the Board's decision in *Family Nursing Home*, 295 NLRB 923 (1989), dictates adoption of the Administrative Law Judge's finding in the matter at hand. Counsel for the General Counsel contends that the facts in *Family Nursing* are substantially different than those presented herein, and that the Board's decision is distinguishable.

In *Family Nursing*, a discharged employee assaulted the respondent's director of nursing. The Board found in that case that reinstatement and backpay were not warranted in

light of the discriminatee's post-discharge violent conduct. *Id.*, 295 NLRB 923, n. 2. As was appropriate, the Board considered whether the discriminatee's conduct was " . . . violent or of such character as to render the employee unfit for further service." *Id.* (citations omitted).

As described more fully in Counsel for the General Counsel's Brief in Support of Limited Exceptions, Atkinson's social media post did not justify the Administrative Law Judge's denial of full backpay and reinstatement. The Board has held that such a denial is warranted only in the face of "extraordinary circumstances", which are not present herein. See *The Fund for the Public Interest*, 360 NLRB No. 110 (May 13, 2014). Atkinson's comments do not rise to this level, however, and do not meet the "high bar" set by the Board in order to relieve Respondent of its obligation to fully remedy its unfair labor practices. See *Connecticut Humane Society*, 358 NLRB 187, n. 2 (2012).

While Respondent suggests in its Answering Brief that Atkinson has a "*demonstrated proclivity* for unlawful discrimination" (Respondent's Answering Brief, p. 6) (emphasis added), the record is devoid of any evidence to support such an outrageous claim. Atkinson was employed by Respondent for over twenty-five years, and there has not been even a suggestion that he ever engaged in discriminatory or offensive conduct during his tenure. Moreover, Atkinson's conduct took place outside of work; he was not even an employee at the time he posted his comments.<sup>1</sup> Respondent's Anti-Harassment Policy refers to conduct in the "workplace", and to the "work environment" (Respondent's Exhibit No. 6). Nothing in the policy refers to conduct occurring outside of an employee's working hours. Surely, Respondent cannot suggest that it has control over its employees' actions when they are not at work, including those employees who have been unlawfully terminated.

Respondent argues in its Answering Brief that the General Counsel has effectively waived any right to challenge the weight accorded to the practically identical, and uniformly

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<sup>1</sup> As the Administrative Law Judge correctly found, Atkinson was no longer employed as a result of Respondent's unlawful actions.

vague, letters introduced by Respondent to purportedly show that many employees have been discharged for violating Respondent's Anti-Harassment Policy (Respondent's Exhibit No. 23).<sup>2</sup> This argument must fail. Respondent did not present any specific evidence regarding the actions taken by these employees that led Respondent to discharge them. It is for Respondent to present evidence sufficient to support its argument that Atkinson is not entitled to backpay and reinstatement. Counsel for the General Counsel asserts that Respondent failed to produce evidence showing the types of conduct which led it to discharge employees for violating its Anti-Harassment Policy, and therefore, the generic discharge letters should not be used to justify denying Atkinson the full remedy to which he is entitled as a result of Respondent's unlawful actions. Moreover, Respondent never raised this issue until the trial in this matter; Counsel for the General Counsel was not given the opportunity to investigate any claim warranting a reduction of backpay or a denial of reinstatement. This is yet another reason why the standard remedy should be ordered. Respondent can raise arguments for tolling backpay and denying reinstatement in a compliance proceeding. Counsel for the General Counsel raised this procedural issue at the hearing (383)<sup>3</sup>.

Ironically, Respondent points out in its Answering Brief that post-discharge misconduct may be mitigated when it is precipitated by the employer's actions (Respondent's Brief, p. 10). In the instant case, it was Respondent's actions - twice unlawfully discharging Atkinson - which led to Atkinson's frustration as exhibited by his single social media post. As Atkinson noted at the hearing, he felt that Respondent had lied about him and taken his 27 year career from him (383). Atkinson also stated, however, that he was sorry for making the comments (383). As the Board correctly observed in *Hawaii Tribune-Herald*, 356 NLRB 661 (2011), enfd. 677 F.3d 1241

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<sup>2</sup> It should be noted that in its Answering Brief, Respondent cites a "UPS Equal Opportunity Statement" (Respondent's Brief, p. 9) which is not part of the record in this case. As such, any argument based upon such statement should be rejected.

<sup>3</sup> Numbers in parentheses refer to pages of the transcript of the hearing before the Administrative Law Judge.

(D.C. Cir. 2012), “. . . employees who are unlawfully fired . . . often say unkind things about their former employers.” 356 NLRB at 662. The Board further stated that “[e]mployers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims’ natural human reactions to the unlawful acts.” 356 NLRB at 662.

Under these circumstances, Counsel for the General Counsel again urges the Board to reject the Administrative Law Judge’s finding on this point. The Administrative Law Judge correctly found that Respondent discharged Atkinson unlawfully on two occasions, and Counsel for the General Counsel submits that Atkinson is entitled to the full remedies available under Board law. Respondent failed to show that Atkinson’s single post rendered him unfit for further service, and therefore, Respondent cannot meet the high standard set by the Board that would allow it to negate its obligation to fully remedy its unlawful conduct. Atkinson is entitled to an offer of reinstatement and full backpay, and, as argued more fully in its Brief in Support of Limited Exceptions, Counsel for the General Counsel urges the Board to issue an appropriate order.

Dated at Pittsburgh, Pennsylvania, this 10th day of March, 2017.

Respectfully submitted,

/s/ Julie R. Stern  
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